TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~315.~~ 88

FLETCHER T. LANSDALE, PLAINTIFF IN ERROR,

vs.

HIBBARD S. DANIELS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED DECEMBER 6, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 315.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Hibbard S. Daniels, plaintiff, and Fletcher T. Lansdale, defendant, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of April, in the year of our Lord one thousand eight hundred and seventy six, and of the Independence of the United States the 100th.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

The above writ of error is hereby allowed.

WILLIAM A. WALLACE,
Chief Justice of Supreme Court, State of California.

(Indorsed:) United States Supreme Court. Fletcher T. Lansdale, pl'ff in error, vs. Hibbard S. Daniels, def't in error. Writ of error. Filed May 4th, 1876. D. B. Woolf, clerk.

2 STATE OF CALIFORNIA,
County of Humboldt, ss:

On this 12th day of June, A. D. 1876, before me personally appeared Frank M. Hignes, who, being by me duly sworn, upon his oath says he is deputy sheriff of the said county; that on the 22d of May, A. D. 1876, in said county, he personally served the annexed citation upon Hibbard S. Daniels, the defendant in error to the writ of error from the Supreme Court of the United States to the supreme court of the State of California, Fletcher T. Lansdale plaintiff in error, by then and there delivering to said Daniels a true copy of said citation and showing him the original to which it is annexed.

FRANK M. HIGNES,
Deputy Sheriff, Humboldt County.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the county of Humboldt the day and year first above written.

[SEAL.] JOHN A. WHALY,
Notary Public.

3 UNITED STATES OF AMERICA, *ss:*

To Hibbard S. Daniels, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Fletcher T. Lansdale is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 14th day of April, A. D. 1876, and of the Independence of the United States the 100th.

WM. A. WALLACE,
Chief Justice of the Supreme Court of the State of California.

(Indorsed:) United States Supreme Court. Fletcher T. Lansdale, pl'ff in error, vs. Hibbard S. Daniels, def't in error. Citation. Filed June 20th, 1876. D. B. Woolf, clerk.

4 In the supreme court.

TRANSCRIPT ON APPEAL.

In the district court of the eighth judicial district of the State of California, in and for the county of Humboldt.

HIBBARD S. DANIELS PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

Complaint.

The above-named plaintiff complains of said defendant, and as grounds of said complaint, alleges that he is the owner in fee, and lawfully entitled to the possession of the following-described land and premises, situate in the county of Humboldt, and State of California, viz: Commencing at or near the southwest corner of section twenty-nine, township six north, range one east, Humboldt meridian, at a point
5 where a slough intersects the west line of said section twenty-nine; thence in a northerly direction and following the line of said slough to where said slough intersects a rail fence; thence in a northerly direction along the line of said fence to the road leading from the town of Arcata to the farm of S. K. Wood; thence west along said road to the west line of said section twenty-nine; thence south to the place of beginning, and along and following the west line of said section twenty-nine, containing seventeen acres, more or less. Also, commencing on the north of said road leading from Arcata to the farm of said S. K. Wood, at a point on the west boundary line of said section twenty-nine; thence along and in a northerly direction along said west line of said section twenty-nine to the north line of the southwest quarter of said section twenty-nine; thence east along said north line of said southwest quarter of said section twenty-nine to where an old picket fence formerly stood; thence southerly down the line of said old picket fence

to the said road above named, and thence west to the place of beginning, containing three acres, more or less.

Said plaintiff alleges that said defendant is wrongfully in the possession of said land and premises hereinbefore described, and wrongfully and unlawfully refuses to deliver up possession thereof to this plaint-
6 iff, though often requested to do so, to the damage of said plaintiff in the sum one thousand dollars.

Wherefore, he demands judgment against said defendant, that said defendant do forthwith deliver up possession of said above described land and premises to said plaintiff, and that judgment be rendered in his favor for the sum of one thousand dollars damages as aforesaid, and against said defendant for costs, etc.

CHA'S WESTMORELAND,
Plaintiff's Attorney.

STATE OF CALIFORNIA,
County of Humboldt:

On this day Hibbard S. Daniels came before me and made oath in due form that he is the plaintiff in the above entitled action; that he has heard the forgoing complaint read and knows the contents, and that the same is true of his own knowledge.

H. S. DANIELS.

Sworn to and sul scribed before me this the first day of March, 1867.
JAMES M. SHORT,
Clerk.

(Indorsed:) Complaint. Hibbard S. Daniels vs. F. T. Lansdale. Filed March 1st, 1867. James M. Short, clerk.

7 *Summons.*

In the district court of the eighth judicial district of the State of California, in and for the county of Humboldt.

HEBARD S. DANIELS }
vs.
F. T. LANSDALE. }

Action brought in the district court of the eighth judicial district of the State of California, in and for the said county of Humboldt, and the complaint filed in said county of Humboldt, in the office of the clerk of said district court.

The people of the State of California send greeting to F. T. Lansdale, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the eighth judicial district of the State of California, in and for the county of Humboldt, and to answer the complaint filed therein (a copy of which accompanies this summons) within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served out of this county, but within this judicial district, within twenty days; or, if served out of said district, then within forty
8 days, or judgment by default will be taken against you accord-

ing to the prayer of said complaint. The said action is brought to obtain judgment against the above-named defendant, that said defendant do forthwith deliver up to said plaintiff the premises described in the complaint so withheld, and also pay the plaintiff the damages sustained by reason of the withholding of said premises, in the sum of one thousand dollars, and for costs; and you are hereby notified that if you fail to appear and answer said complaint as above required, the said plaintiff will take judgment against you in accordance with the prayer of this complaint.

Given under my hand and the seal of the district court of the eighth judicial district of the State of California, in and for the said county of Humboldt, this first day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] JA'S M. SHORT,
Clerk.

[U. S. rev. fifty-cent stamp. J. M. S., March 1, 1867.]

OFFICE OF THE SHERIFF OF THE COUNTY OF HUMBOLDT.

I hereby certify that I received the within summons on the second day of March, A. D. 1867, at six o'clock p. m., and personally served
9 the same on the fourth day of March, A. D. 1867, by delivering to F. T. Lansdale, said defendant, personally, in the said county of Humboldt, a copy of said summons, attached to a certified copy of the complaint.

Dated this fourth day of March, A. D. 1867.

JOSEPH TRACY, *Sheriff*,
By BYRON DEMING,
Deputy Sheriff.

(Indorsed:) Summons. H. S. Daniels vs. E. T. Lansdale. Charles Westmoreland, plaintiff's attorney. Filed this fourth day of March, A. D. 1867. Jas. M. Short, clerk.

Answer and cross-complaint consolidated.

In the district court of the eighth judicial district of the State of California, in and for the county of Humboldt.

H. S. DANIELS.)
vs.
F. T. LANSDALE.)

The defendant above named, for answer to the complaint filed against him in the above-entitled action, admits that he is in the possession of the parcels of land described in said complaint, and has been in the quiet and peaceable possession thereof since the month of January, 1854, and he says that said lands are a part of the southwest quarter of sec-
10 tion number twenty-nine, in township number six north, of range number one east, Humboldt meridian, and constitute a part of the public domain of the United States, situate in the county of Humboldt, and State of California; and he denies that said possession is in any manner wrongfully or unlawfully, or that plaintiff has been damnified in the sum of one thousand dollars, or in any sum whatever.

And for a further and separate answer and defence and cross-complaint to the complaint of the plaintiff herein, the defendant answers and complains against the plaintiff, and for cause of action avers that heretofore,

to wit, on the third day of March, 1853, the Congress of the United States passed an act, which was on that approved, and became a law, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," whereby, under the sixth section thereof, all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, granted to the State for school purposes, and with the exception of lands appropriated under the authority of said act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands in the State,
11 were subject to the pre-emption law of the fourth of September, 1841, with all the exceptions, conditions, and limitations therein, except as otherwise provided in the said act of the third of March, 1853.

And the defendant further avers that by the terms of the said last mentioned act he was authorized to make a settlement on any unsurveyed public lands of the United States not within the exceptions heretofore enumerated, within one year from the passage of said act.

And this defendant further avers that the said act of the third of March, 1853, was continued in full force and operation within the said State of California for the period of two years from and after the date and by virtue of an act entitled "An act for the extension of the pre-emption privileges in the State of California," approved on the first day of March, 1854. And the defendant avers that under and by virtue of the said act of the fourth of September, 1841, as modified and extended to California by the said acts of the third of March, 1853, and the first of March, 1854, he, the defendant, being then and there a citizen of the United States of America, and still being such citizen, and over twenty-one years of age, and then and there being the head of a family, did, on or before the twenty-second day of February, 1854, and before the
12 expiration of the year limited in the said act of the third of March, 1853, enter and settle upon the southwest quarter of section number twenty-nine, in township number six north, of range number one east of Humboldt meridian, within the county of Humboldt and State of California, the said land being public land of the United States and at that time unsurveyed, and to which there was no Indian title, and not within any one of the reservations of the said act of September 4th, 1841, or the reservations of said act as modified by the said act of the third of March, 1853.

And the defendant further avers that on or before the said twenty-second day of February, 1854, he entered upon said land in person with the intention of making a settlement thereon to actually inhabit, improve, and cultivate the same for agricultural purposes, and to avail himself of the privileges of the said acts of 1841 and 1853 by pre-empting the same so soon as the said land should be surveyed, and the surveys returned under said acts.

And the defendant further avers that he at once proceeded to erect a dwelling-house upon and otherwise to improve and cultivate the said quarter section, and has continued to reside thereupon in person until the month of July, 1866, and since then has occupied the same by his tenant, except as to a part whereof in the possession of the plaintiff as hereinafter stated and described.

13 And the defendant further avers that at the time he entered upon the said land the said county of Humboldt was within the land district in the State of California known as the Marysville district, and that the land office for said district was situated in the town of

Marysville and county of Yuba, within said State, and that said county of Humboldt continued to be within said district until the month of 1858, at which time the Humboldt district was established by the authorities of the United States, when said county of Humboldt became a part of said Humboldt district, and the land office for said district was located at the town of Eureka, in said county; and defendant avers that, having settled on said quarter section as aforesaid, and cultivated and improved the same, and erected a dwelling-house thereon, and inhabited the same with his family, he continued to occupy and inhabit the same until on or about the twentieth of February, 1856, when he made and filed in the land office at Marysville his statement in writing, declaring his intention to enter said quarter section, containing one hundred and sixty acres of land, at the minimum price, and to pre-empt the same under the acts of 1841 and 1853, and which declaratory statement so made and filed by him was in the words and figures following, to wit:

14 *Declaratory statement.*

I, F. T. Lansdale, of Union, Humboldt County, State of California, being the head of a family, over the age of twenty-one years, a citizen of the United States, have, on this twenty-second day of February, A. D. 1854, settled and improved the southwest quarter of section number twenty-nine, in township number six, of range number one east, in the district of land subject to sale at Marysville, and containing one hundred and sixty acres, which land has not yet been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intentions to claim the said tract of land as a pre-emption right under the provisions of the act of the third of March, 1853.

Given under my hand and seal this the first day of January, 1856.

F. T. LANSDALE.

In presence of—
JOHN M. RICE.

Which said declaratory statement had indorsed thereon the words and figures following, to wit: Filed twentieth February, 1856; 102; F. T. Lansdale's declaration. Humboldt County, 6 N., 1 E., Humboldt meridian.

Which said declaratory statement, with the indorsement thereon, now remains on file in the said land-office at Eureka aforesaid, the same having been transmitted with the other papers and records of the
15 office at Marysville, pertaining to the lands embraced within the Humboldt district, to the said office at Eureka.

And the defendant further avers that at the time the settlement was made by him as aforesaid, on or before the twenty-second day of February, 1854, the township lines within which the said section number twenty-nine was situated had not been established by survey, and that the sectional lines of the said section number twenty-nine had not been surveyed; but he avers that on the twentieth day of February, 1856, when he made the declaration at the office at Marysville the meridian had been established, the township lines run, and the sectional lines surveyed by the surveyor-general of the United States for the State of California, by and through his deputies, and duly approved by him, but he avers that on that day the plots of said surveys had not been returned and filed in the said land-office at Marysville by the said surveyor-gen-

eral, and were not so filed by him until the twenty-sixth day of April, 1856.

And the defendant further avers that he has made due proof under said acts of 1841 and 1853, and which were continued in force by the act of the first of March, 1854, as aforesaid, when thereunto required by the officers of the United States Land Office, and before the proclamation for public sale of the lands con-
16 tained in the land district in which the said southwest quarter of section number twenty-nine, township six north, of range number one east, were situated before the register and receiver of the land office for the Humboldt district, at Eureka aforesaid, of his said settlement, erection of a dwelling house and other improvements, cultivation and habitation, with his family, in full compliance with said laws, by legal and competent proof, and offered to enter the said quarter section, and pay the price required therefor by law, in lawful money of the United States, to wit, for the said one hundred and sixty acres of land included in said quarter section. That said proof was made before the register and receiver of the land office at Eureka, pursuant to notice from said officers, in the month of December, 1859; that further proof was made of the same matters before the same officers at the said office pursuant to a further notice from said officers on or about the fourth day of November, 1861, and subsequent days, ending on or about the fifth day of December, 1861, which said proofs last mentioned, as defendant is informed and believes and therefor charges the fact to be, were not forwarded by the register and receiver to the Commissioner of the General Land Office at Washington, as by the rules and reg-
17 ulations of the General Land Office they were obliged to do; but to the great detriment and prejudice of this defendant the same now remains in the land office at Eureka; and that afterwards, to wit, on or about the twenty-second day of September, 1863, the said matters having been sent back to the said register and receiver by the Commissioner of the General Land Office at Washington for that purpose, still further proofs were made therein by this defendant and by the plaintiff on that and following days, ending on or about the seventeenth day of November, 1863; but notwithstanding the said settlement, the erection of a dwelling house, habitation, cultivation and due proof thereof, made as aforesaid, and the filing of his said declaratory statement as aforesaid, and the offer to enter the said land and the tender to pay for the same and the full compliance by the defendant in all respects with said law ane the rules and regulations of the General Land Office of the United States, neither the officers of the said land office at Eureka aforesaid nor the Commissioner of the General Land Office at Washington would allow the defendant to enter and pay for the said one hundred and sixty acres of land by accepting the money for the same and by issuing to him a certificate for such payment and a patent for the said land; but, on the contrary, have refused to allow the de-
18 fendant to enter the said land, and still refuse to do so, although frequently thereto requested.

And the defendant aver', as further answer and cross complaint to the complaint of the plaintiff herein, on information and belief, that the said officers of the land office at Eureka, the Commissioner of the General Land Office at Washington, and the Secretary of the Interior Department of the United States at Washington, were instigated and induced by the false and fraudulent acts and representations of the plaintiff in that behalf made, and by the false and fraudulent representations of others made on behalf of the plaintiff, at his instance and

for his benefit, and in order to prevent the said officers from acting favorably upon the pre-emption right of the defendant to the said quarter section, as in law they were obliged to do as heretofore stated, to disallow and reject his said claim, and to award to the plaintiff the N. E. ¼ and the N. W. ¼ and the S. W. ¼ of the said S. W. ¼ of said section number twenty-nine, including therein the land described in said complaint and the dwelling house and all other improvements made therein by the defendant since his first settlement of the same as heretofore stated.

And defendant further avers, on information and belief, that the false and fraudulent act and representations of the plaintiff and his confederates last above complained of, consists of letters, written by or
19 on behalf of the plaintiff and at his request, or on his behalf, to the officers of the General Land Office at Washington and to the Secretary of the Interior Department of the Government of the United States at Washington, during the pendency of the controversy between plaintiff and the defendant, before said officers of the General Land Office and before the Secretary of the Interior, respecting the several rights claimed respectively by the plaintiff and defendant, to enter the tracts or legal subdivisions of land claimed by them, severally adversely as hereinbefore set forth, and during the existence of the late civil war between the United States Government and a portion of the States comprising the said United States, called and known as the Southern Confederate States, in which said letters or in some portion whereof the character and fidelity of the defendant of the Constitution and the Union of the said United States was slanderously assailed and misrepresented and the said defendant falsely and fraudulently represented as a rebel and a traitor to the same, and in which said letters or in some portion or portions whereof the said defendant was falsely and fraudulently represented as a land thief and a land pirate and other injurious and opprobrious statements and charges were made against the character, standing, and reputation of the defendant in the community
20 in which he resided, which said false, slanderous, and fraudulent representations as conveyed in the letters aforesaid to the said officers of the General Land Office and to the said Secretary of the Interior were calculated and intended to injure and defame the character, reputation, and standing of the defendant in the particular matters above stated with the said officers and with the said Secretary, and to induce and instigate them to withhold from the defendant his right to enter said quarter section of the land, and award to the plaintiff the right to enter the said N. E. ¼ and N. W. ¼, and the S. W. ¼ of the said S. W. ¼ of said section twenty-nine, which said original letters, as defendant is informed and believes, now remain on file in the General Land Office of the United States, and copies of which, duly certified according to law, defendant asks to have annexed to and filed with this answer and cross complaint when and as soon as the same can be obtained.

And the defendant charges that in consequence of said false, slanderous, and fraudulent representations, the said officers of the General Land Office, and the said Secretary of the Interior, believing the said charges against the character, standing, and reputation of the defendant, as a man and as a citizen of the United States, to be true, and influenced and induced thereby to act unfavorably upon the claim of the defendant to enter the said southwest quarter of said section number twenty-nine, refused to permit this defendant to enter the same, as in law they
21 were obliged to do, but in derogation of his rights in that behalf allowed the plaintiff to enter the N. E. ¼ and the N. W. ¼, and

the S. W. ¼ of said S. W. ¼ of said section number twenty-nine, including therein the land first settled upon and cultivated by the defendant, and described in the complaint filed herein, and his dwelling house and all other improvements made thereon by the defendant, as hereinbefore stated and as defendant is informed and believes, have caused a patent to be signed to the plaintiff therefor, which acts and doings of the plaintiff and his confederates, and of the officers of the General Land Office induced thereby, are injurious and oppressive to this defendant, and in violation of his just rights, and contrary to equity and good conscience.

And for further cause of action against the said plaintiff, the defendant avers that the plaintiff made entry upon the southwest quarter and a portion of the northeast quarter of the said southwest quarter of said section number twenty-nine, the said land being then unsurveyed as above stated, on or about the first day of November, ~~1863,~~ but the plaintiff failed and neglected to erect a dwelling house upon said land, as by the provisions of said pre-emption laws he was required to do, but inhabited a dwelling house erected thereon by one Edward Hale, prior to plaintiff's said entry, and acquired by plaintiff by purchase from said Hale, who had erected and occupied the same prior to the said
22 entry of the plaintiff, and plaintiff continued to occupy said house and one or more additions thereto, acquired also by purchase from third parties, until some time in the summer of 1863, when plaintiff at length proceeded to erect a dwelling house upon said land and thereafter to inhabit the same.

1853

And defendant, for further answer and cross-complaint to the complaint of the plaintiff herein, avers that the said plaintiff failed and neglected to comply with the provisions of the said pre-emption laws hereinbefore cited, by filing his statement in writing declaring his intention to enter the said N. E. ¼ and the N. W. ¼ and the S. W. ¼ of the said southwest quarter of said section number twenty-nine at the said land office at Marysville within the time prescribed by pre-emption laws for the filing thereof, or within the time limited for the operation and effects of the said acts of September 4th, 1841, and of March 3d, 1853, by the said act of March 1st, 1854, extending the provisions of the said acts of 1841 and 1853 to the State of California for two years from the date of said act of March 1st, 1854, to wit, on or before the first day of March, 1856, on which day last mentioned the pre-emption law of 1841 and the act of March 3rd, 1853, as extended by the act of March 1st, 1854, as applied to the State of California, by force and effect of the limitation in said acts contained, expired, ceased, and determined, and any and
23 all acts done by the plaintiff after the said last mentioned day, to wit, the first day of March, 1856, claiming or pretending to be done under or in pursuance of said several acts of Congress, and required by said acts to be done, to establish a right in the said plaintiff to pre-empt the said land, defendant says were and are wholly and absolutely void and of no effect.

And defendant avers that no declaratory statement or notice of intention to pre-empt the said N. E. ¼ and the N. W. ¼ and the S. W. ¼ of the said southwest quarter of said section number twenty-nine was in fact filed by the plaintiff, either in the said land office at Marysville or in the said land office at Eureka, until on or about the 11th day of October, 1858, long after the said several acts of Congress had ceased to be in force in California, and long after the expiration of the three months after the return of the plat of the survey of township number six north, of range number one east, Humboldt meridian, to the said land office at Marysville, which filing defendant says was wholly void

and of no effect, and the reception and filing of which on the part of the register and receiver of the said land office at Eureka was unauthorized by any law of Congress and wholly inoperative and of no effect.

Wherefore defendant avers that the several acts of the officers of the United States Land Office withholding from this defendant and awarding to the plaintiff the right to enter the said northeast quarter and the northwest quarter and the southwest quarter of the said southwest quarter of said section number twenty-nine, and the issuance to the plaintiff of a patent therefor, are and were absolutely null and void and against law, for the purpose of vesting in the plaintiff an absolute title thereto, and that by reason of the premises the right to the title for the same is in this defendant and not in the plaintiff.

Wherefore defendant prays this honorable court to restrain and enjoin the said plaintiff from proceeding in the said action of ejectment until the subject matter of this cross complaint shall have been heard and determined, and that upon the final hearing thereof the court decree and declare that the plaintiff be decreed to hold the patent for the northeast quarter and the northwest quarter and the southwest quarter of said southwest quarter of said section number twenty-nine, township six north, range one east, Humboldt meridian, obtained by him from the United States, and the title by it in him vested in trust for this defendant, and that he be decreed to convey by quitclaim deed all the right, title, and interest vested in him by said patent in and to said tracts or legal subdivisions last above described to this defendant, and that unless plaintiff execute such conveyance within ten days after the signing and entry of said decree, then that the clerk of this court be directed to execute the same for him and in his name; and that in the mean time said decree shall itself stand for a conveyance to all intents and purposes of said tracts or legal subdivisions, and that the plaintiff render to the defendant full and complete possession of the same.

And that the plaintiff be enjoined from conveying or encumbering said tracts or legal subdivisions, or any part thereof, and that the defendant may recover judgment for damages for with'olding the premises, being one hundred and twenty acres, less the twenty acres parcel thereof now in defendant's possession, in the amount which may be found due by this court, and for all other and further relief which unto this court shall seem meet and according to equity and good conscience.

H. W. HAVENS,
Attorney for Defendant.

STATE OF CALIFORNIA,
County of Humboldt, ss :

F. T. Lansdale, the defendant above named, being duly sworn, saith that he has heard the foregoing answer and cross-complaint read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

F. T. LANSDALE.

Subscribed and sworn before me this 27th day of July, 1867.

JAMES M. COX,
Justice of the Peace.

(Indorsed:) H. S. Daniels vs. F. T. Lansdale. Answer and cross-complaint consolidated. H. W. Havens and G. W. Tompkins, attorneys for defendant.

Service of the within accepted by copy.
Eureka, July , 1867.

CHAS. WESTMORELAND,
Plaintiff's Attorney.

Filed July 27th, 1867.

JAS. M. SHORT, *Clerk.*

Demurrer to cross complaint.

In the district court of the eighth judicial district of the State of California, in and for the county of Humboldt.

H. S. DANIELS
vs.
F. T. LANSDALE.

Said plaintiff, by attorney, comes and demurs to the cross-complaint of said defendant, in said action, and for grounds for such demurrer shows that the same does not state facts sufficient to constitute a
27 cause of action on a cross-complaint, in this:

Firstly. That it does not appear from said cross-complaint that said Lansdale filed the notice of his said claim to said land claimed by him, and described in such answer and cross-complaint, in the land office for said district within three months after the return of the plats of the surveys of said lands to the said land office, but that it does appear therefrom that he filed such notice before said plats of said survey had been returned to said land office.

Secondly. That it appears from said answer and cross-complaint that all the matters alleged by said defendant in his said cross-complaint have heretofore been determined and adjudicated by a competent tribunal, in an issue about the same property and between the same parties.

Thirdly. That it does not appear from such cross-complaint that said defendant made the proof required by law before the register and receiver of the land office for the Humboldt district of his said alleged settlement, etc., prior to the day appointed by the President's proclamation for the commencement of the sale of such land.

Fourthly. Because said cross-complaint shows that said defendant has not occupied the land in controversy in this action in person since
28 July, 1866, but by a tenant since that time.

C. WESTMORELAND,
Of Counsel.

(Indorsed:) Daniels vs. Landsdale. Demurrer to cross-complaint. Service of copy admitted August 6th, '67. H. W. Havens, attorney for defendant. Filed August 6th, 1867. Jas. M. Short, clerk.

District court, June term, A. D. 1868.

SATURDAY, *June 20th*, 1868.

Court met pursuant to adjournment.
Present, Hon. John P. Haynes, presiding.

H. S. DANIELS, PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

In this case the demurrer to defendant's cross complaint having been

heretofore argued and taken under advisement by the court, the court at this time sustains the demurrer.

Court was then adjourned.

J. P. HAYNES,
District Judge, Eighth Judicial District.

29 *Ruling of court on demurrer.*

In the district court of the eighth judicial district of the State of California, in and for the county of Humboldt.

H. S. DANIELS
vs.
F. T. LANSDALF.

This is an action of ejectment, brought to recover possession of a certain parcel of land designated as a portion of the southwest quarter of section number seventy-nine, township number six north, of range number one east, Humboldt meridian. Plaintiff claims under United States patent issued to him as a pre-emptioner.

Defendant admits that he is in possession of the premises, but denies that his possession is in any manner wrongful or unlawful, and in his answer and cross-complaint, after setting forth many grounds of complaint for the equitable interposition of the court, asks for a decree to the effect that the plaintiff hold the patent and the title by it in him vested in trust for defendant, and that he be decreed to convey to defendant by quit-claim deed, all the right, title, and interest vested in him by said patent, and for further relief.

The material allegations of the cross-complaint may be briefly and substantially stated as follows:

30 Firstly. That he entered upon said lands—which at that time were public and unsurveyed lands of the United States—on or before the 22d day of February, 1864, and proceeded to erect a dwelling-house thereon, to inhabit the same, and to cultivate the soil.

Secondly. That he made due and legal proof in accordance with law, before the register and receiver of the United States land office at Eureka, of his settlement, erection of a dwelling-house, cultivation, and habitation by his family, and offered to enter said lands and pay for them, which proof was made pursuant to notice in the month of December, 1859; and further proof was made in pursuance of further notice in the months of November and December, 1861, which proofs he charges were not forwarded to the Commissioner of the General Land Office at Washington; that the matter having been sent back from the General Land Office to Eureka, further proof was made by himself and plaintiff at various times from September to November, 1863; but that notwithstanding his said proofs, the Commissioner of the General Land Office, at Washington, nor the register and receiver at Eureka, would permit him to enter and pay for said lands.

Thirdly. That the register and receiver at Eureka, the Commissioner of the General Land Office, and the Secretary of the Interior were

31 instigated by false and fraudulent acts and representations of plaintiff and his confederates to act unfavorably on his claim, to disallow the same, and to award the lands to plaintiff, and execute to him a patent therefor, said false and fraudulent representations consisting of letters written to the department, impeaching the loyality and

patriotism and defaming the character of the defendant, thereby prejudicing his interest.

Fourthly. That plaintiff made entry upon said lands, or a portion thereof, on the 1st of November, 1853, but failed to erect a dwelling-house thereon, but lived in a house erected by one Hale, and failed to file his declaratory statement within the time prescribed by law, to wit, before the first day of March, 1856, and that all acts done by him thereafter were null and void.

To the cross-complaint plaintiff demurs, upon the ground that it does not state facts sufficient to constitute a cause of action, or a cross complaint with specifications of objections.

The question then presented for the consideration of the court is this: Does the cross complaint state facts sufficient to warrant the equitable interposition of the court and to grant the relief sought therein?

Here we will remark, that we doubt not but that courts of competent jurisdiction may inquire into and revise the adjudication of the
32 register and receiver and other officers of the Land Department; but whilst this is true as a proposition of law, yet the decisions of these tribunals, created and organized as they are for the special purpose of trying and determining controversies of this character, are entitled certainly to great consideration. They should not be set aside, annulled, or disturbed for slight causes, but only in those cases where it is conclusively shown that they have acted palpably in violation of law, either wilfully or through mistake, or have been imposed upon by false testimony and fraudulent acts of others.

In fact, from the examination I have given this matter, I am inclined to the opinion that these are the only grounds upon which courts should interfere with or relieve from the adjudication of these tribunals.

It is true that it is alleged in the cross-complaint that the register and receiver of the land office at Eureka, the Commissioner of the General Land Office at Washington, and the Secretary of the Interior were induced by the false and fraudulent representations of the plaintiff and his confederates to award the lands in dispute to plaintiff, and to issue to him a patent therefor in derogation of the rights of defendant. It appears, however, that these representations were only made by private letters written to them, and not in the authoritative shape of affidavits or depositions, or in any other form of proof known to the law.

33 It is certainly asking a good deal of the court to presume that the officers named would give to these letters the force and effect of legal proof, or that they would in anywise be controlled or influenced by such means.

If it had been alleged that the proofs submitted by plaintiff were false or fraudulent, or that the witness had testified erroneously through mistake, and that by reason of such false or mistaken testimony the officers had been deceived and imposed upon, and through this deception had awarded the patent to plaintiff, there would have been more substantial ground for the relief sought. Although it appears by the cross-complaint that a great deal of testimony was taken and submitted to the department by each of the parties at various times, yet there is no intimation whatever that any of it was false or mistaken.

In the argument considerable stress was laid upon the alleged fact that plaintiff failed to comply with the pre-emption laws by omitting and neglecting to file his declaratory statement within the time prescribed by law, to wit, prior to the first day of March, 1856. It is claimed that any act done by plaintiff in this connection after that date was of no validity. We cannot attach the same importance to this fact

as counsel seem to do, because the act of Congress of March 3d, 1853, as extended by the act of March 1st, 1854, provides that no settlement shall be authorized on unsurveyed lands after that time,
34 but no limitation whatever is prescribed by the act as to the time of filing declaratory statements upon lands in fact settled upon before that time, except that they be filed within three months after the return of the plats of survey to the Land Office. This doubtless was a matter subject to be regulated by the rules to be prescribed by the Secretary of the Interior under the act of 1841.

It is alleged in the defendant's bill or cross-complaint that the proofs made by defendant before the register and receiver at the land office in Eureka in the months of November and December, 1861, were not forwarded to the Commissioner of the General Land Office at Washington, as required by the rules and regulations of the office.

These, it appears, were additional to the proofs made in December, 1859, and had reference to the settlement, improvement, and cultivation of the land in controversy by defendant, and the occupancy thereof by himself and family. This I take to be the most material and substantial fact alleged in the bill, and but for other considerations now to be mentioned would consider it of sufficient weight and importance to put the case on trial under the proofs. The considerations named are those growing out of two very material facts admitted in the bill, which would be fatal to the claim of defendant for the relief sought. These facts are:

First. It appears that defendant filed his declaratory statement
35 on the 20th day of February, 1856, more than two months before the return of the plats of survey to the land office, whereas the act of 1853 provides that it shall be filed within three months after the return. In the opinion of the Commissioner of the General Land Office, as given in the case of Bangs vs. Matthews, such filing is a nullity.

Second. It is admitted by defendant in the bill that the entry and settlement of plaintiff upon the land was prior in time to his own, to wit, on the first day of November, 1853, whilst his own was on the twenty-second day of February, 1854. The force of this admission is sought to be obviated by the allegation that the plaintiff did not erect a dwelling-house, but bought a house already built by one Hale, and continued to occupy the same until the summer of 1863.

It seems to me that this point is rather too refined to entitle it to so great consideration as counsel would attach to it. I take it that the great material fact is the entry, actual settlement, occupation, and cultivation of the land prior to any and all others, whether he built the dwelling-house himself, hired another to build it for him, or bought it after it was built, matters not. The dwelling-house was there on the land, owned, possessed, and occupied by the plaintiff as his home three months before the defendant entered and attempted to make his settlement. This prior entry and settlement, followed up by all the
36 proper and necessary proceedings to perfect his pre-emption right, and ultimating in a patent, gives to the plaintiff a superior equity.

The bill, instead of showing grounds for the relief therein prayed for, clearly shows that plaintiff has a better equity than defendant.

I am, therefore, constrained to sustain the demurrer, and it is so ordered.

(Indorsed:) H. S. Daniels vs. F. T. Lansdale. Ruling of court on demurrer. Filed June 24th, 1868. Jno. A. Watson, clerk.

District court, June term, A. D. 1868.

WEDNESDAY, *June 24th*, 1868.

Court met pursuant to adjournment.
Present, John P. Haynes, presiding.

H. S. DANIELS, PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

At this time court sustains the demurrer, and orders that defendant's cross-complaint be, and the same is hereby, dismissed.

To which ruling of court defendant's counsel except.

Defendant's counsel then ask the court that a stay of proceedings be granted to enable them to perfect an appeal to the supreme court, and also that the court fix the amount of the bond to be given on appeal.

37 The court orders that a stay of proceedings be, and the same is hereby granted for the space of fifteen days, in which defendant's counsel may perfect their appeal. Court also orders that the amount of the bond be, and the same is hereby, fixed at the sum of two thousand dollars.

Court was then adjourned.

J. P. HAYNES,
District Judge, Eighth Judicial District.

District court, eighth judicial district, December term, 1869.

MONDAY, *December 13th*, 1869.

District court of the eighth judicial district met at a regular term.
Present, Hon. J. P. Haynes, presiding.

H. S. DANIELS, PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

This cause coming up at this time on remittitur from supreme court, filed herein, Jas. Hanna, esq., appeared as counsel for plaintiff, and H. W. Havens, esq., counsel for defendant, was passed for the present, to come up for trial in its regular order.

Court then adjourned.

J. P. HAYNES,
District Judge, Eighth Judicial District.

38 FRIDAY, *December 31*, 1869.

Court met pursuant to adjournment.
Present, Hon. J. P. Haynes, presiding.

H. S. DANIELS, PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

This being the time fixed by the court for the trial of the above-entitled cause, and the case now coming on to be heard before the court, sitting as a jury, the right to a trial by jury having been heretofore ex-

presly waived, the case was then tried before the court on the testimony of witnesses for the plaintiff and defendant, and argued before the court by counsel for the respective parties, on the question of damages for the detention of the property described in plaintiff's complaint.

The court then takes the case under advisement.

Court then adjourned.

J. P. HAYNES,
District Judge, Eighth Judicial District.

TUESDAY, *January 11th*, 1870.

Court met pursuant to adjournment.

Present, Hon. J. P. Haynes, presiding.

H. S. DANIELS, PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

39 This cause having been tried before the court and taken under advisement, it is by the court at this time ordered, adjudged, and decreed that the plaintiff herein, H. S. Daniels, have and recover of and from F. T. Lansdale, the above-named defendant, possession and restitution of the real estate described in plaintiff's complaint, together with the sum of five hundred and forty ($540) dollars damages and costs of suit, and that judgment be entered accordingly.

Court then adjourned.

J. P. HAYNES,
District Judge, Eighth Judicial District.

WEDNESDAY, *January 12th*, 1870.

Court met pursuant to adjournment.

Present, Hon. J. P. Haynes, presiding.

H. S. DANIELS, PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

This cause being called up at this time, H. W. Havens, esq., counsel for defendant, asks the court for a stay of proceedings for ten days in the above-entitled cause, and that the court fix the amount of the bond, to prevent waste, and for use and occupation.

Whereupon it is by the court ordered that a stay of proceedings for ten days be had in said cause, and that the amount of the bond be fixed in the sum of five hundred dollars.

Court adjourned.

J. P. HAYNES,
District Judge, Eighth Judicial District.

40 *Judgment.*

In the district court of the eighth judicial district of the State of California, in and for the county of Humboldt.

HIBBARD S. DANIELS, PLAINTIFF,
vs.
F. T. LANSDALE, DEFENDANT.

This cause coming on regularly for trial on the 31st day of December

1869, being a day of December term, 1869, of said court, and plaintiff having heretofore demurred to the answer and cross-complaint of the defendant, and said demurrer having been sustained by the court, and no motion being made by defendant to amend the answer, now at this time the case coming on to be heard on the complaint, and so much of the answer as denies the wrongful and unlawful possession of defendant and damages sustained, James Hanna appearing as counsel for plaintiff, and H. W. Havens for defendant, and a trial by jury having been expressly waived, the cause was tried by the court.

The parties having submitted their testimony, and the evidence being closed, the court, after due consideration, finds that the possession of said premises by defendant is wrongful and unlawful, and that plaintiff is entitled to the possession thereof. Also, that the plaintiff
41 has sustained damages by reason of the detention of the premises in the sum of five hundred and forty dollars.

Wherefore, by reason of law and the findings aforesaid, it is by the court ordered, adjudged, and decreed that Hibbard S. Daniels, the plaintiff herein, do have and recover of and from the said defendan Lansdale, possession and restitution of the following described land and premises situate in Humboldt County, in the State of California, viz: Commencing at or near the southwest corner of section twenty-nine, township six north, range one east, Humboldt meridian, at a point where a slough intersects the west line of said section twenty-nine; thence in a northerly direction and following the line of said slough to where said slough intersects a rail fence; thence in a northerly direction along the line of said fence to the road leading from the town of Arcata to the farm of L. K. Wood; thence west along said road to the west line of said section twenty-nine; thence south to the place of beginning, and along and following the west line of said section twenty-nine, containing seventeen acres, more or less. Also commencing on the north of said road leading from Arcata to the farm of said L. K. Wood, at a point on the west boundary line of said section twenty-nine; thence along and in a northerly direction along said west line of said section twenty-nine to the north line of the southwest quarter of
42 said section twenty-nine; thence east along said north line of said southwest quarter of said section twenty-nine to where an old picket fence formerly stood; thence southerly down the line of said old picket fence to the said road above named, and thence west to the place of beginning, containing three acres, more or less. And that said defendant do forthwith deliver up possession of the above-described lands and premises to the said plaintiff above named.

And it is also ordered, adjudged, and decreed that said plaintiff, H. S. Daniels, do have and recover of and from the said defendant, F. T. Lansdale, the sum of five hundred and forty dollars damages, with legal interest thereon from the date hereof, together with the further sum of sixty dollars and sixty-five cents, plaintiff's costs and disbursements incurred in this action.

RECAPITULATION.

Judgment for damages	$540 00
Costs	60 65
	$600 65

Judgment entered January 13th, 1870.

JNO. A. WATSON, *Clerk.*

Notice of appeal.

In the district court of the eighth judicial district in and for the county of Humboldt and State of California.

43 H. S. DANIELS, PLAINTIFF AND RESPONDENT,
vs.
F. T. LANSDALE, DEFENDANT AND APPELLANT.

Take notice that the defendant herein appeals from the judgment and decree rendered in the above action by the district court of the eighth judicial district for Humboldt County, at the December term of said court, held in said county for the year 1869, in favor of said plaintiff and against the said defendant, and also from the order made by said court at the June term thereof, held for the said county in the year 1868, sustaining the demurrer to the answer and cross-complaint of the said defendant, and dismissing said answer and cross-complaint.

Dated January 18th, 1870.

Yours, &c.,

H. W. HAVENS,
Attorney for Defendant and Appellant.

To Messrs. John A. Watson, clerk, and Jas. Hanna, esq., attorney for plaintiff and respondent.

Assignment of errors.

First. The court erred in sustaining the demurrer to the answer and cross-complaint of the defendant.

Second. The court erred in rendering judgment for the plaintiff, and damages in the sum of six hundred dollars and sixty-five cents.

H. W. HAVENS,
Attorney for Defendant and Appellant.

44 (Indorsed:) H. S. Daniels, plaintiff and respondent, vs. F. T. Lansdale, defendant and appellant. Notice of appeal. H. W. Havens, att'y for def't and appellant.

I accept service of the within notice by copy, January 18th, 1870.

JAS. HANNA,
Att'y for Respondent.

Filed January 18th, 1870.

JNO. A. WATSON,
Clerk.

Undertaking on appeal.

In the district court of the eighth judicial district, in and for the county of Humboldt and State of California.

H. S. DANIELS, RESPONDENT,
vs.
F. T. LANSDALE, APPELLANT.

Know all men by these presents, that we, A. L. Pardee and Albert G. Handy, both residents and freeholders of the county of Humboldt and

State of California, and by occupation farmers, are severally and jointly held and firmly bound unto H. S. Daniels, the above-named plaintiff and respondent, in the penal sum of two thousand and fifty dollars, lawful money of the United States, to be paid to the said H. S. Dan-
45 iels, his executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, severally and jointly, firmly by these presents, sealed with our seals, dated the twenty-first day of January, A. D. 1870.

Whereas the plaintiff in the above-entitled action has recovered a judgment and decree in the district court of the eighth judicial district for the said county of Humboldt, against the said F. T. Lansdale, the defendant therein, for the possession of the premises described in the complaint in this action, and six hundred dollars and sixty-five cents damages and costs for the withholding of the said premises, from which judgment and decree the said defendant has appealed to the supreme court of the State of California:

Now, therefore, the condition of this obligation is such, that if the said defendant shall pay all damages and costs which may be awarded against him on the appeal not exceeding the sum of three hundred dollars; and also, if the said defendant shall pay the amount directed to be paid by the said judgment, if the said judgment be affirmed on appeal, or the part of such amount as to which the said judgment shall be affirmed if affirmed only in part, and all damages and costs which shall be awarded against the said defendant and appellant
46 upon the appeal, and shall also pending said appeal, and during his possession of the real property described in the plaintiff's complaint, refrain from committing or suffering the committal of any waste thereon, and shall pay to the plaintiff the value of the use and occupation of said property, from the time of such judgment until the delivery of possession thereof, pursuant to said judgment, not exceeding the further sum of five hundred dollars, and shall in all things stand to and abide by the judgment and decree of the said supreme court herein on appeal, then this obligation to be void; otherwise to be and remain in full force and virtue.

A. L. PARDEE. [SEAL.]
A. G. HANDY. [SEAL.]

Sealed and delivered in the presence of—
H. W. HAVENS.

STATE OF CALIFORNIA,
County of Humboldt, ss:

A. L. Pardee and Albert G. Handy, whose names are subscribed to the foregoing obligation, being first severally duly sworn, each for himself deposes and says that he is worth the sum of two thousand and fifty dollars, specified in the foregoing obligation, over and above
47 all his just debts and liabilities, exclusive of property exempt from execution.

A. L. PARDEE.
A. G. HANDY.

Subscribed and sworn before me this 21st day of January, A. D. 1870.
H. W. HAVENS,
Notary Public for Humboldt County.

(Indorsed:) H. S. Daniels, respondent, vs. F. T. Lansdale, appellant. Undertaking on appeal. H. W. Havens, att'y for appellant. Filed January 22d, 1870. Jno. A. Watson, clerk.

Clerk's certificate.

STATE OF CALIFORNIA,
County of Humboldt, ss:

HIBBARD S. DANIELS, RESPONDENT,
vs.
FLETCHER T. LANSDALE, APPELLANT.

I, John A. Watson, clerk of the district court of the eighth judicial district, in and for said State and county, do hereby certify that the foregoing are true and correct copies of the complaint, summons, answer, and cross-complaint, demurrer, minutes of the court, ruling of
48 court, judgment, notice of appeal, assignment of errors, and undertaking on appeal in the above-entitled cause, and that the same constitute the transcript on appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this second day of April, A. D. one thousand eight hundred and seventy.

[SEAL.] JOHN A. WATSON,
Clerk Eighth District Court.

[U. S. revenue stamp, 5 cents, canceled.]

(Indorsed:)

CITY & COUNTY OF SAN FRANCISCO, *ss:*

E. C. Green, being duly sworn, deposes and says that he is and was at the several times herein mentioned clerk in the office of Elisha Cook, counsel for appellant in the above-entitled action; that as such clerk, and at the request of said Cook, deponent did, on the 5th day of May, A. D. 1870, serve upon Jas. Hanna, esq., who is the att'y for the respondent upon this appeal, a copy of the within transcript, by depositing the same in the post-office at the city and county of San Francisco, enclosed in an envelope addressed "Jas. Hanna, esq., att'y at law, Eureka, Humboldt County, Cala.," and prepaying the postage thereon on said 5th day of May, 1870. That said Jas. Hanna resides at Eureka, Humboldt County, Cal'a.

49 That there is, and was when said package was so deposited in the post-office, a United States mail running regularly from San Francisco to said Eureka.

E. C. GREEN.

Sworn to before me this 5th day of May, 1870.
[NOTARIAL SEAL.] W. H. CHEVERS,
Notary Public.

(Endorsed:) Filed May 6, 1870. Geo. Seckel, cl'k, by B. A. Mardis dep.

50 In the supreme court of the State of California, January term, A. D. 1872.

HIBBARD S. DANIELS, RESPONDENT,
vs.
T. F. LANSDALE, APPELLANT. } No. 2439.

On appeal from the district court of the 8th judicial district, in and for the county of Humboldt.

And now, at this day, this cause being called, and having been here-

tofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Rhodes, J., Niles, Wallace, & Crockett, Js., concurring, to the effect that the judgment of the court below be affirmed.

Whereupon, it is now considered, ordered, adjudged and decreed by the court here, that the judgment of the district court of the 8th judicial district, in and for the county of Humboldt, in the above-entitled cause, be and the same is hereby affirmed with costs.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the twelfth day of January, A. D. 1872, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this twenty-third day of June, A. D. 1867.

[SEAL.] D. B. WOOLF, *Clerk*,
By JOHN P. POOLE, *Deputy*.

(Indorsed:) No. 2439. In the supreme court, State of California. Remittitur. Daniels vs. Lansdale.

51 *Opinion of Court.*

In the supreme court of the State of California.

HIBBARD S. DANIELS, RESPONDENT,
vs.
F. T. LANSDALE, APPELLANT. } No. 2439.

It appears from the cross-complaint that the parties were contesting pre-emption claimants of the land in controversy; that the plat of the survey was filed with the register of the proper land office on the 26th day of April, 1856; that the defendant filed his declaratory statement February 20, 1856; that the plaintiff filed his declaratory statement October 11, 1858; that after a hearing of the contest before the register and receiver of the local land office, and before the Commissioner of the General Land Office, and finally before the Secretary of the Interior, the right of pre-emption was awarded to the plaintiff, and subsequently a patent was issued to him. There are allegations in the cross-complaint, the purpose of which is to show that the decision of the Secretary of the Interior was procured by fraudulent acts and practices of the plaintiff; but that portion of the case need not be considered, as there is one point upon which the court below was clearly right in sustaining the demurrer to the cross-complaint. The defendant's declaratory statement was filed before the surveyor-general had filed the plat of the survey in the register's office. The declaratory statement was filed prematurely, and was therefore a nullity. Such
52 is the current of the decisions of the Land Department, though there is one case, and perhaps more, to the contrary. It would seem to be no more unreasonable or illogical to hold that the filing of a complaint, before the cause of action had accrued, would be valid, as the first step in the commencement of an action, than to hold that the filing of a declaratory statement, before the time authorized by law, was valid as a pre-emption claim. The defendant had no standing in the contest before the officers of the Land Department, as he did not show that he occupied the status of a pre-emption claimant, and he

now claiming no right to the land, except in the capacity of a pre-emption claimant, cannot be heard to aver that the plaintiff holds the land in trust for him.

Judgment affirmed.

RHODES, *J.*

We concur.

NILES, *J.*
WALLACE, *J.*
CROCKETT, *J.*

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the opinion filed in the above-entitled cause on the 12th day of January, 1872, as shown by the records of my office.

Witness my hand and the seal of the court this 20th day of June, A. D. 1876.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

53 In the supreme court of the State of California.

Know all men by these presents, that Fletcher T. Lansdale, as principal, and E. Abramson and E. H. Pardee, as sureties, are held and firmly bound unto Hibbard S. Daniels in the sum of five hundred ($500) dollars, lawful money of the United States of America, to be paid to the said Daniels, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated the twenty-fifth day of April, A. D. one thousand eight hundred and seventy-six.

The condition of the above obligation is such, that whereas lately at a supreme court of the State of California, in a suit pending in said court between said Daniels and said Lansdale, a judgment was rendered against said Lansdale, and the said Lansdale having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in said suit, and a citation directed to said Daniels citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, A. D. 1876: Now, if said Lansdale shall prosecute said writ to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

54

F. T. LANSDALE. [SEAL.]
E. ABRAMSON. [SEAL.]
E. H. PARDEE. [SEAL.]

Signed, sealed, and delivered in the presence of—
SAM'L S. MURFEY.

STATE OF CALIFORNIA,
County of :

E. Abramson and E. H. Pardee, the sureties whose names are subscribed to the within bond as parties thereto, being severally duly sworn, each for himself says that he is a resident of the State of California, and that he is worth the sum of five hundred dollars, the sum

specified in said bond as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

E. H. PARDEE.
E. ABRAMSON.

Subscribed and sworn to before me this 25th day of April, A. D. 1876.
[SEAL.] SAM'L S. MURFEY,
Notary Public.

Approved.

WM. T. WALLACE,
Chief Justice Supreme Court California.

Filed May 4th, 1876.

D. B. WOOLF, *Clerk.*

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a bond from F. T. Lansdale et al. to H. S. Daniels, filed in my office on the 4th day of May, A. D. 1876, as shown by the records of my office.

Witness my hand and the seal of the court this 21st day of June, A. D. 1876.

[SEAL.] D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy.*

55 In the supreme court of the State of California.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing documents and papers are and constitute a true copy and transcript of the record and of all the proceedings in the above-entitled cause as the same appear upon the records and files of said court in my office.

And I do further certify that on the 4th day of May, 1876, the said plaintiff in error filed in this court a writ of error (herewith transmitted), duly allowed by the Hon. Wm. T. Wallace, chief justice of this court, removing said cause to the Supreme Court of the United States, and lodged in my office a copy of such writ of error for the defendant in error, and also on the 24th day of June, 1876, filed a citation (herewith transmitted) purporting to have been served upon the defendant in error in person; also a bond in the sum of five hundred dollars, a copy of which is hereto annexed, with sureties approved by the chief justice of this court, conditioned that said plaintiff in error shall prosecute his said writ to effect, and in case he fail to make his plea good, to answer all costs.

Witness my hand and the seal of said court this twenty-ninth day of June, A. D. 1876.

[SEAL [D. B. WOOLF,
Clerk of the Supreme Court of California.

(Indorsement on cover:) No. 315. Fletcher T. Lansdale, plaintiff in error, vs. Hibbard S. Daniels. California sup. court. Filed 6th December, 1876.

UNITED STATES SUPREME COURT.

October Term, A. D. 1879.

FLETCHER T. LANSDALE,
Plaintiff in Error,

vs.

HIBBARD S. DANIELS,
Defendant in Error.

No. 88.

Error to the Supreme Court of California.

R. MASON,

Attorney for Plaintiff in Error.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

UNITED STATES SUPREME COURT.

October Term, A. D. 1879.

FLETCHER T. LANSDALE,
Plaintiff in Error,

vs.

HIBBARD S. DANIELS,
Defendant in Error.

No. 88.

Error to the Supreme Court of California.

Daniels, the defendant in error, on the first of March, 1867, instituted proceedings for the recovery of certain lands in Humboldt County, Cal., and of damages for their detention.

Lansdale, plaintiff in error, was duly summoned, and, on the 27th of July, 1867, filed his answer and cross complaint. He admits possession, but denies that it was wrongful.

In his cross complaint he sets up pre-emption title as follows:

Entry and settlement under the act of March 3d, 1853, extended for two years by the act of March

1st, 1854, providing for pre-emption rights on the public lands in California.

See 10 Stat. at Large, 244 and 268, and Act of 1841, 5th Stats., 455, 10th Sect.

Avers entry and settlement on the 22d of February, 1854, on lands then unsurveyed but open to settlement, he having the qualifications of a pre-emptor.

Avers the erection of a dwelling-house and continued possession and cultivation, in person, until July, 1866, and since then by tenant.

That, on the 20th of February, 1856, he filed, in the proper Land Office, his declaratory statement, as required by the acts of 1841 and 1853, which declaratory statement was duly endorsed and filed, and still remains on file in the proper office.

That, although the land was unsurveyed at the time of the entry, it had been duly surveyed, and the survey approved by the proper officers, before the filing of said declaratory statement. The plots of survey were returned to the local Land Office on the 26th of April, 1856.

Avers that he made due proof prior to the proclamation for the public sale of said lands, as required by the acts of Congress, and offered to enter and pay for said lands. That, further proof being demanded, he made the same, but that the register and receiver failed to forward the same to the General Land Office; and, notwithstanding his compliance with all the requirements of the law, the land officers refused to allow him to enter said land.

That the said action of the land officers was induced

by the false and fraudulent representations of the plaintiff below.

Avers entry upon a portion of said lands, by said Daniels, about the 1st of November, 1853. The said Daniels did not file his declaratory statement within the time limited by the acts of 1841, 1853, and 1854, nor until after the expiration of the time limited by law for pre-empting land in California, viz., until the 11th of October, 1858, which filing he alleges to be unauthorized and void.

Wherefore, the said Lansdale prays that the defendant be enjoined from proceeding with his action at law, and that the said Daniels be decreed to hold the patent granted him by the United States in trust for him (the said Lansdale), and that said Daniels be ordered to convey the same to said Lansdale.

To this cross complaint plaintiff below filed a general demurrer, assigning for cause—1st, that said Lansdale's declaratory statement was not filed "within three months after the return of the plats of the surveys of the said lands to the said Land Office," but that he filed such notice before said plats of survey had been returned to said Land Office.

2d. That all the matters alleged had "been determined and adjudicated by a competent tribunal in an issue about the same property and between the same parties."

3d. It does not appear that the said Lansdale made the required proofs, before the register and receiver, prior to the day appointed by the President's proclamation for the commencement of the sale of such lands.

4th. Because said Lansdale had not occupied the land in controversy, in person, since July, 1866.

The demurrer was sustained by the district court at the June term, 1868, and the cross-complainant dismissed, and at the January term, 1870, judgment for $540.00 and costs, was given to the plaintiff below.

The case was duly appealed to the Supreme Court of California, and at the January term, 1872, the judgment of the court below was affirmed.

A writ of error was duly allowed, bringing the case into this court.

Assignment of errors.

And now comes the plaintiff in error and assigns for error that the court erred in sustaining said demurrer; and secondly, that they erred in affirming the judgment of the court below in dismissing the said cross-complainant and giving judgment for possession, damages and costs. And thirdly, they erred in holding that because the declaratory statement of said Lansdale was filed before the Surveyor General had filed the plat of survey in the register's office; that it was, therefore, a nullity.

Argument for Plaintiff in Error.

The act of 1841, (5 Stats. at Large, 455,) provides that heads of families, &c., who shall make settlements in person on the public lands, &c., which have been surveyed, and shall inhabit and improve the same, and shall erect a dwelling thereon, shall be authorized to enter in the local land office, "by legal

sub-divisions, any number of acres not exceeding one hundred and sixty, to include the residence of such claimant upon paying the United States the minimum price of such land."

Section 11 provides that, "when two or more persons have settled on the same quarter, the right of pre-emption shall be in him or her who has made the first settlement, *provided such person shall conform to the other provisions of this act.*"

And it further provides, that all questions shall be settled by the register and receiver of the district, subject to appeal to the secretary.

The 15th Sec. provides that "whenever any person has settled a tract of land subject to private entry, and shall intend to purchase the same under the provisions of this act, such person shall within thirty days next after such settlement, file with the register of the proper district, a written statement describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act, and shall, within twelve months after the date of settlement, make the proof, affidavit and payment herein required;" (required by 12th and 13th sections) "*and if he or she shall fail to file such written statement as aforesaid,* or shall fail to make such affidavit, proof and payment within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any purchaser."

The act of 1853 relating to public lands in California, 10 Stats. at large, p. 246, sect. 6, provides that all the public lands in the State of California, whether

surveyed or unsurveyed, excepting, &c., shall be subject to the pre-emption law of Sept. 4, 1841, with all the exceptions, conditions and limitations therein, except as hereinafter provided * * * * provided that when unsurveyed lands are claimed by pre-emption, the usual notice of such claims shall be filed within three months after the return of the plats of survey to the local Land Office, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of sales, &c., the entry of such claims to be made by legal sub-divisions, according to the United States survey, and in the most compact form; such settlements are limited to one year after the passage of this act.

By the act of March 1, 1854, 10 Stats. 268, this privilege was extended for two years.

The cross complaint of the plaintiff in error alleges the performance, on his part, of all the things required to be done in order to entitle him to the rights of pre-emption, viz:

1. That, in February, 1854, while the land was unsurveyed, the plaintiff in error, then defendant below, as a qualified pre-emptor, made pre-emption settlement on the quarter section described, under the acts of Congress approved March 3, 1853, and March 1, 1854, immediately commencing residence thereon, and rendering full compliance with the requirements of the pre-emption laws up to July, 1866, when he was virtually ousted from the greater part of said quarter section by the wrongful act of the Depart-

ment of the Interior, in awarding the same to the plaintiff below, now defendant in error.

2. That, in pursuance of notice from the proper officers, the defendant below submitted to such officers, at different times, due proof of his settlement on said quarter section, and of his full compliance with the requirements of law, and that he repeatedly offered to enter and pay for said land, but was not permitted to do so.

3. That part of the proof thus submitted was not forwarded by said officers to the General Land Office, at Washington, as required by the regulations of that office, but was wrongfully retained at the local office, and now remains at Eureka, Cal., to the great injury of the plaintiff in error.

4. That, although the plaintiff below made settlement, in November, 1853, on land which, after the survey thereof, was found to cover one hundred and twenty acres of the quarter section described, and including the improvements of the plaintiff in error, the defendant below, yet the plaintiff below subsequently failed to comply with the requirements of said act of March 3, 1853, under which he claimed, in the matter of filing a declaratory statement within three months after the return of the plat of surveys to the United States Land Office, as no such filing was made by him until October, 1858, more than two years after the three months' limitation had expired, and more than two years after the expiration of all provisions of law authorizing pre-emption settlements on unsurveyed lands in California.

The opinion of the Supreme Court of California is found on page 21 of the record, and is reported in 43d California Rep., p. 41. The opinion is based entirely upon the proposition that the plaintiff in error filed his declaratory statement before the Surveyor-General had filed his plat of the survey in the register's office. The Court say:

"The declaratory statement was filed prematurely, and was therefore a nullity * * *. The defendant had no standing in the contest before the officers of the Land Department, as he did not show that he occupied the status of a pre-emption claimant, and he now claiming no right to the land, except in the capacity of a pre-emption claimant, can not be heard to aver that the plaintiff holds the land in trust for him."

No other exception is taken to the sufficiency or regularity of the entry, occupancy or cultivation of the land by the plaintiff in error. The averments of the cross-complainant must be taken as true in this case; and they seem to include all that was necessary to be done by the plaintiff in error to establish his right as a pre-emptor, if his declaratory statement is accepted as being duly filed.

It should be noted that both parties having made settlement before the lands were surveyed, it could not be determined that there was any conflict of right between them until the lines were established by survey, when, for the first time, it was known that their houses being in the same quarter section, they were rival claimants for the same lands. It cannot be said that Lansdale entered upon lands already appropriated

by another, for at the time of his entry no one could tell that the two houses would fall in the same quarter, section, or even township. The parties stand, therefore, simply upon their legal rights. Daniels, as the first settler, would unquestionably have had the better right, if he had done the things required by the statute, to be done in order to confirm his rights.

As, however, the plaintiff below failed to file his declaratory statement until long after the time limited for filing the same had expired; his filing was a nullity, and the plaintiff below forfeited whatever rights he had acquired by virtue of his prior settlement, in favor of the defendant below, whose settlement three months later in time was followed up by full compliance with all the requirements of law.

The requirement of filing a declaratory statement within a limited period is one of the *other* provisions of the act, and a neglect on the part of a prior settler to comply with this requirement has always been considered such a defect under that statute as may be taken advantage of by a subsequent settler who has fully complied with its requirements, and such is the distinct provision of the statutes as herein before quoted.

Johnson vs. *Towsley*, 13 Wal.

The 12th sec. provides that the proof of settlement and improvement required by the act of 1841 shall be made to the satisfaction of the register and receiver of the proper district, and the Secretary of the Interior is authorized to prescribe rules to regulate the submission of such proof. But the statute confers upon

him no authority to prescribe rules for modifying, or setting aside, any of its provisions, and the District Court of California was manifestly in error when it assumed that the requirement in the act of March 3, 1853, touching the filing of a declaratory statement within three months after the return of the plats of surveys to the Land Office was a matter subject to be regulated by the rules to be prescribed by the Secretary of the Interior under the act of 1841.

The Secretary had no such power. The neglect of the plaintiff below to make his filing within three months after the return of the plats of survey to the Land Office was such a defect as to forfeit the rights he had acquired by his prior settlement, in favor of the defendant below, if the latter had fully complied with the requirements of law as alleged in his cross complaint, and no executive officer had the legal right to deprive him of the advantage thus acquired.

The Supreme Court of the State waived a consideration of this point, upon the ground that the defendant below had filed his declaratory statement before the Surveyor-General had filed the plat of survey in the register's office, which the court held to be a premature filing on the part of the defendant below, and therefore a nullity, leaving him without any standing in the contest. But, clearly, the court erred in this. The words "*within three months after* the return of the plat of survey to the Land Office," are words of limitation to provide against too much delay in filing the statement required of the settler. The preposition *within*, as used here, signifies *not be-*

yond, or *not exceeding*, and the language imports that the settler must file his declaratory *not beyond* three months after the return of the plat of survey. This is the meaning given by lexicographers to the word *within* when it relates to a period of time; and it is the meaning this court gave to the word as used in section 3 of the captured and abandoned property act of March 12, 1863, in the clause, "any person claiming "to have been the owner of any such abandoned or "captured property may, at any time *within two years* "*after* the suppression of the rebellion, prefer his "claim to the proceeds thereof in [illegible]

In the Anderson case (9 Wa[illegible] court held that the right to insti[illegible] der this statute, attached as soon as the money reached the Treasury, whether the war had or had not closed, and that Congress did not intend, by the language used, to compel a claimant to wait until the rebellion was suppressed before preferring his claim to the proceeds of such abandoned or captured property, notwithstanding the words, "at any time *within two years after* the suppression of the rebellion."

This decision covers precisely the point made in the case at bar by the court below. In the one statute the words are, "*within two years after* the suppression of the rebellion; in the other, "*within three months after* the return of the plat of surveys to the Land Office." The analogy is complete. In neither case was there any purpose on the part of Congress to guard against too much promptness, but against the consequences of too much delay. The declaratory statement of the defendant below was on file on

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In the Anderson case (9 Wallace, ~~125, 126~~), this court held that the right to institute proceedings, under this statute, attached as soon as the money reached the Treasury, whether the war had or had not closed, and that Congress did not intend, by the language used, to compel a claimant to wait until the rebellion was suppressed before preferring his claim to the proceeds of such abandoned or captured property, notwithstanding the words, "at any time *within two years after* the suppression of the rebellion."

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the very day the Surveyor-General made return of the plat; it was on file during the whole period of the *three months*, and during all the time that has since elapsed. It has met the requirements of the statute in every particular. It has furnished the notice and served the purpose contemplated by Congress. The circumstance of being on file some two months before it was required to be on file injured no one. Being constantly on file, and subject to examination, any day might be designated as the day of filing. The court below compared the filing of a declaratory statement before the return of the plat by the Surveyor-General, to the filing of a complaint before a cause of action has accrued, but the illustration is illogical and defective. In the case of a complaint filed before a cause of action has accrued, any allegation of an existing right of action is necessarily untrue. But in the declaratory statement filed by defendant below, every allegation was true at the date of filing, and was wholly independent of the action of the Surveyor-General in making return of the plat of surveys.

The Register of the United States Land Office might, doubtless, have declined to receive the declaratory statement until the plat of surveys had been returned; but as he did receive, endorse, and file it, and has ever since retained it on file, it comes, in every respect, within the intent and purpose of the statute, and is a legal and valid filing.

We do not claim that under any circumstances, advantage would have accrued to Lansdale by filing his declaratory statement before the plat of survey was

returned to the local office, nor do we understand that it would have availed him in the then condition of affairs to have filed it after the return of the survey, and before the filing by Daniels, if the latter had filed his statement within the three months limited by the statute. What we do claim is this: that both parties being *bona fide* locators, Daniels having failed to comply with the requirements of the statute. Lansdale became entitled to purchase the land because he made out the declaratory statement as soon as the completion of the survey enabled him to designate "the legal sub-division" which he claimed, and filed the same with the register, in whose office it remained, subject to the examination of all inquirers from that time, including the whole of the three months named in the statute, and down to now. The declaratory statement could not be made out until the surveys were made and approved; that is the limit in one direction, the limit in the other is three months after the surveys are returned to the local office, and if on file within the three months, the statute is complied with. It is the having on file the notice which is the important fact, not the act of handing it to the register, nor the endorsing of it by him as filed. It would be a strange conclusion to declare that Lansdale's declaratory statement was not "filed within three months after the return of the plats of survey" when, during every instant of the three months, a strictly formal paper endorsed as filed by the proper officer remained in its proper place in the office.

The assignment of grounds for demurrer on page 11 of the record sets forth four defects. The first alone was sustained by the court, the other three may be briefly disposed of.

The second sets up that the matter, by reason of the action of the officers of the Land Office, has become *res adjudicata*.

This point has been settled by repeated decisions of this court of which it is sufficient to refer to *Johnson* vs. *Towsley*, 13 Wal., in which the whole question is reviewed and finally determined in favor of the jurisdiction in equity.

The third cause assigned, that it does not appear from the cross complaint that the defendant made the required proof prior to the day appointed by the President's proclamation of sale, is an error in matter of fact, for a sufficient allegation to that effect is found in the cross complaint, page 7, paragraph commencing on third line.

The fourth cause assigned, that the defendant had not occupied the land, in person, since 1866, but by tenant since that time, does not appear to be fatal, because we nowhere find any statute imposing upon a claimant an indefinitely protracted personal occupancy of the land. If he occupied the land, made the improvements, filed the declaratory statement, offered his proofs, and tendered the purchase money, certainly he had done enough to fix his rights, and subsequent occupancy, by agent, is sufficient to repel any implication of abandonment of his rights.

We respectfully submit that the demurrer should have been overruled.

R. MASON,
Atty. for Plff. in Error.

No. .....

IN THE

SUPREME COURT

OF THE

UNITED STATES.

FLETCHER T. LANSDALE,
Plaintiff in Error,

vs.

HIBBARD S. DANIELS,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

W. W. COPE,
Attorney for Defendant in Error.

WALTER VAN DYKE,
Of Counsel.

J. L. RICE & CO., Printers, No. 511 Montgomery Street, San Francisco.

No......

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UNITED STATES.

FLETCHER T. LANSDALE,
Plaintiff in Error,

vs.

HIBBARD S. DANIELS,
Defendant in Error.

Brief of Defendant in Error.

This is a writ of error to the Supreme Court of the State of California. The plaintiff in error was the defendant in the Court below.

The action is ejectment, and the questions in the case arise upon a pleading filed by the defendant and known as a cross-complaint.

Rec. fols. 15—25.
Stat. 1865–6, p. 701.

The plaintiff claims under a patent from the United States issued to him as a pre-emptor.

The defendant claims that he was entitled to the patent, and the object of the cross-complaint is to establish a trust in his favor, and compel a conveyance by the plaintiff.

A demurrer to the cross-complaint was sustained, and on appeal to the Supreme Court of the State, the judgment was affirmed.

Daniels vs. Lansdale, 43 Cal. 41.

The parties were contesting claimants before the Land Department.

The settlement of the plaintiff was made in November, 1853, and that of the defendant in February, 1854, the land being unsurveyed.

Rec. fols. 12—22.

The date of the survey is not alleged, but it appears that the defendant filed his declaratory statement prior to the return of the plat of the survey to the local land office. The statement was filed on the 20th of February, 1856, and the plat was returned on the 26th of April, 1856. It is alleged that the survey was made and approved previous to the filing of the declaratory statement.

Rec. fols. 13—15.

The cross-complaint is not very specific as to the improvements made by the plaintiff, but it

shows that at the time of his entry in 1853, he purchased a dwelling-house already erected upon the land, and that the house so purchased was occupied by him until the summer of 1863, when he built another.

Rec. fol. 22.

There is no allegation that he failed to comply with any of the requirements of the pre-emption laws in regard to the occupancy or improvement of the land, unless the purchase of a dwelling-house instead of erecting one was a failure in that respect.

The additional matters set forth in the cross-complaint, so far as any importance can be attached to them, may be concisely stated as follows:

1. That the provisions of the pre-emption laws as to the improvement, occupancy, and cultivation of the land, were fully complied with by the defendant.

Rec. fol. 13.

2. That in the month of December, 1859, he made due proof of these matters before the Register and Receiver, and that in November, 1861, and subsequently, further proofs were taken on the subject, a portion of which were not forwarded to the Department at Washington.

Rec. fols. 16—18.

3. That the controversy was decided in favor of the plaintiff, and that the officers of the De-

partment were prejudiced against the defendant and influenced in their decision by certain false and fraudulent acts and representations, consisting of letters written by the plaintiff or at his request, charging the defendant with disloyalty to the United States, and as being a "land thief and a land pirate," and a bad character generally.

Rec. fols. 18—20.

4. That no declaratory statement or notice of intention to claim the land was filed by the plaintiff until about the 11th of October, 1858.

Rec. fols. 23, 24.

We submit that the case made by the cross-complaint is not such as to entitle the defendant to the relief demanded.

The statement of facts is not only defective and insufficient, but shows affirmatively that the decision of the Land Department was correct.

I.

There is no allegation that the defendant complied with the provisions of Section 13 of the Pre-emption Act of 1841.

5 Stat. at Large, 456.

The oath required by that section was a condition precedent to be performed by the defendant in order to perfect his right of pre-emption. By the terms of the section, the making of the oath

was a pre-requisite to the entry of the land, and the fact that it was made goes directly to the title of the defendant, and should have been specifically alleged. It was necessary for the defendant to state all the facts on which his right depended.

The cross-complaint contains an allegation to the effect that *notwithstanding the proofs made and a compliance by the defendant in all respects with the law*, the officers of the Department refused to allow him to enter the land.

Rec. fols. 17, 18.

It may be contended that this allegation involves the fact of the making of the oath, and we concede that if the law was complied with the conditions imposed by the statute must have been performed. But the question is one of pleading, and the statement as to a compliance with the law amounts to nothing. It is simply a conclusion of the pleader based upon his view of the requirements of the law and the fact of performance. These are matters for the Court, however, and not for the pleader. It is for the Court to say whether the law has been complied with, and the facts showing a compliance must be alleged.

People vs. Jackson, 24 Cal. 630.
Himmelman vs. Danos, 35 Cal. 441.
Burrell vs. Haw, 40 Cal. 373.

The California Code of Practice provides that in pleading the performance of conditions precedent in a contract, it shall be sufficient to allege

generally that the conditions have been performed, but the cases we have cited show that this provision has no application to conditions prescribed by a statute.

II.

The declaratory statement of the defendant was filed more than two months prior to the return of the plat of the survey. This was in direct violation of the law on the subject, which required it to be filed within three months *after* such return.

10 Stat. at Large, 246, Sec. 6.

The language is explicit as to the time of filing, and the defendant was not at liberty to disregard the provisions of the Act in that respect more than in any other. The statement was to be filed within a specified period commencing with the return of the plat. The period being fixed by the Act, the Courts have no dispensing power, nor can they relieve the defendant from the consequences of a failure to comply.

The fact that the statement remained in the local land office and was there when the plat was returned does not help the defendant. It was made and filed without authority, and the subsequent custody of the paper was unofficial and purely voluntary on the part of the Register. He might have destroyed it without committing any offense or impropriety. It was not a proper paper to be received or kept in the office.

The laws we have cited show the nature and object of such a statement.

See Act of 1841. Sec. 15, and Act of 1853, Sec. 6.

It is simply a notice or declaration of intention to claim the land. It must be filed in order to give the claimant any standing as a pre-emptor. His settlement alone is not sufficient for that purpose. He becomes an applicant for the land by filing his declaratory statement. The time and mode of filing are expressly provided for. The law must be complied with in both particulars. The time is no less important than the mode. The intention to be declared is that existing after the return of the plat. This is the necessary effect of the requirement. A statement as to what the claimant previously intended would clearly be insufficient, and there is no difference between such a case and the one now presented. The statement here refers expressly to the intention of the defendant at the time of the filing. It shows his intention at that time and not afterwards. What he intended when the plat was returned is only a matter of conjecture. It does not appear from the statement, and no other evidence on the subject is recognized by the law.

The Court will readily perceive that the objection we make does not rest on any technical ground. It is based on a positive requirement of the law which the defendant invokes in support of

his title. The provision is plain, and having failed to comply with it, he must suffer the consequences. If the statement had been filed at the proper time, its effect would have been to preclude the defendant from asserting any other claim as a pre-emptor, at least so long as his application was undetermined by the Department. Being prematurely filed, he was not bound by it or subjected to any disability. He could change his mind, abandon the land, and locate on another tract. It is evident that no advantage can be derived by him for such a statement.

This view of the question was sustained by the Court below, and accords with the practice and rulings of the Land Department.

In a case from Minnesota, decided by Commissioner Hendricks in 1857, he gave his opinion on the subject to the effect that a pre-emption claimant must comply with the law in declaring his intention, and that a declaration filed before the time designated is a nullity.

1 Lester's Land Laws, 400. No. 451.

The decision was placed on another ground, but the point was expressly determined by Secretary Delano in a later case.

Copp's Land Laws, 420, No. 431.

The same principle was decided by Secretary Schurz in the recent case of McKee vs. Walther.

Copp's Land Owner, September, 1878.

But we do not care to pursue the argument. The question is one of construction, and the language used is too plain to be misunderstood.

III.

These points, if we are correct in our views upon them, are decisive of the case, but we shall notice briefly the other questions arising on the cross-complaint.

1. It is no objection to the claim of the plaintiff that he purchased a dwelling-house instead of erecting one. Having purchased a house already upon the land, the law did not require him to erect another. The language is in the alternative—"who has or shall erect a dwelling thereon."

Act of 1841, Sec. 10.
1 Lester's Land Laws, 424, No. 484.

We submit the question without further comment. No argument is necessary.

2. The point as to the filing of the declaratory statement of the plaintiff is equally untenable. According to the cross-complaint, the statement was filed more than two years after the return of the plat, but there is nothing in this to benefit the defendant or defeat the claim of the plaintiff. Both parties settled upon the land while it was unsurveyed, and the same error was committed by each in filing his declaratory statement, except

that the statement of the defendant was filed before and that of the plaintiff after the period prescribed by the Act. But the settlement of the plaintiff was first made, and as between him and the defendant, the equities are in favor of the plaintiff. The proceeding here is strictly analogous to a bill in equity, and a universal rule in the adjustment of equities is that the superior equity must prevail. There are no exceptions to this rule, and it is certainly applicable to the present case. But in addition to his superior equity, the plaintiff has the legal title, and if the defendant, with only an inferior equity, could establish a trust against the plaintiff, it would be an anomaly in equity jurisprudence. Neither of the parties complied with the law in filing his declaratory statement, and it does not lie in the mouth of the defendant to impeach the title of the plaintiff by reason of the failure on his part. Being the first settler, the plaintiff had the best right to the land, and there is not the slightest ground for the interference of the Court on behalf of the defendant.

It is unnecessary to inquire whether the land was properly awarded to the plaintiff as between him and the United States. A few remarks on the subject, however, will not be out of place. The cross-complaint seems to assume that when the plaintiff filed his declaratory statement, the pre-emption laws applicable to California had expired by their own limitation. This is true only

as to the portion of these laws relating to settlements on unsurveyed lands. By the Act of 1853, such settlements were allowed for the period of one year, which was afterwards extended to three years. When the statement was filed, the land still remained subject to pre-emption, and we must presume in favor of the decision of the Department that the plaintiff possessed the necessary qualifications and had performed the acts required of him as a pre-emptor. The fact that his settlement was made prior to the survey, and that he failed to declare his intention within three months after the return of the plat, did not deprive him of the right to purchase. If a valid adverse claim had intervened, his failure in that respect might have been fatal, but not otherwise.

3. The allegation that certain proofs were not forwarded to the Department at Washington is easily met. The proofs alluded to were only a portion of the proofs taken in the case. It appears that proofs were taken on three different occasions, the first in December, 1859, the second in November, 1861, and the third in September, 1863, and subsequently. The last were taken under an order from the General Land Office sending the case back for further evidence. The proofs not forwarded were those taken in November, 1861, and it is alleged that they related to matters fully established by the previous proofs. This being so, the defendant could not have been injured, and the omission complained of, though

possibly a dereliction of duty, resolves itself into a mere abstraction. In addition to this, however, the order sending the case back must have referred to any defects found in the proofs, and if the defendant failed to supply the defects thus pointed out, so far as he could supply them, the fault was his own. There is no pretense that the first proofs were not forwarded, nor is it averred that the proofs on which the case was finally decided were not as full and complete as the defendant could make them. But in any point of view, the allegation is insufficient as a ground of relief against the plaintiff. It is a bald statement that the proofs were not forwarded. Their materiality is not shown, nor does it appear that the defendant was under any mistake or misapprehension in regard to them. It may be that the omission was known to him at the time, and that he acquiesced in or even assented to it. The contrary is not alleged directly or indirectly. When or how the omission was discovered by him is not stated. If such an omission would be available at all, it is only on the ground of fraud, and the facts constituting the fraud should have been alleged. The mere fact that the proofs were not forwarded is manifestly insufficient.

4. The remaining point relied on by the defendant is that during the contest before the Land Department various letters were written by the plaintiff or at his request impeaching the loyalty of the defendant and reflecting upon his character

as a man and a citizen. It is alleged that these letters were addressed to the officers of the Department at Washington, that the statements contained in them were false, and that the effect was to create a prejudice against the defendant under the influence of which the case was decided in favor of the plaintiff. It would be absurd to suppose that the matters stated in this connection have any foundation in fact, but so far as they are properly pleaded, the demurrer admits them, and the question is as to their legal sufficiency.

The Court will perceive that the charges thus made rest upon the assumption that mere personal abuse amounted to a fraud for which the decision may be set aside. The right of the defendant as a pre-emptor did not depend on his loyalty or general good character, and whatever the plaintiff may have said about him in these particulars, whether true or false, was utterly immaterial. Any fraud in the procurement of the decision would undoubtedly be sufficient to justify the interference of the Court, but such a fraud cannot be inferred from facts or circumstances having no relation to the controversy between the parties. It is obvious that the conduct imputed to the plaintiff, however unjust or improper, was not a fraud invalidating the decision "It seems to be conclusively settled," says STORY, "that a judgment can only be impeached in equity for fraud in its concoction."

2 Sto. Eq. Sec. 1575.

We think this principle is applicable here. The contest before the Department was strictly a judicial proceeding, and the decision has all the elements of a judgment.

The prejudice alleged to have been created against the defendant and its effect upon the decision are matters to be taken in connection with the other facts stated. They could not be pleaded independent of the facts relied on to sustain them. An allegation that the decision was the result of prejudice, without stating any additional facts, would be fatally defective. There is no room for a difference of opinion on this point, and in view of the facts stated as the grounds of the prejudice, the allegations on the subject are simply an indecent assault upon the officers of the Department. We have no doubt the Court will so regard them, and it would be an ungracious thing to put the Department on trial as to the existence and effect of a prejudice alleged to have arisen from loose statements outside of the evidence and wholly irrelevant to the controversy. The difficulty of such an inquiry is a serious objection to it, but common decency forbids that the motives of public officers should be subject to judicial investigation on pretexts so flimsy and unsubstantial. It may be said that the allegations in this respect are admitted, but the demurrer only admits such matters as are well pleaded.

IV.

We desire in conclusion to call attention to certain features of the cross-complaint not yet noticed.

It is well settled that the Courts will not review a decision of the Land Department proceeding merely upon the weight of evidence. The rule on the subject is laid down in Shepley vs. Cowan, 1 Otto, 330, as follows: "The officers of the "Land Department are specially designated by "law to receive, consider, and pass upon proofs "presented with respect to settlements upon the "public lands with a view to secure rights of pre-"emption. If they err in the construction of the "law applicable to any case, or if any fraud is "practiced upon them, or they themselves are "chargeable with fraudulent practices, their rulings "may be reviewed and annulled by the Courts when "a controversy arises between private parties "founded on their decisions; but for mere errors "of judgment upon the weight of evidence in a "contested case before them, the only remedy is "by appeal from one officer to another of the De-"partment, and perhaps under special circum-"stances to the President."

There are other cases to the same effect, and the doctrine is now understood to be well established.

Johnson vs. Towsley, 13 Wall. 72.
Moore vs. Robbins, 6 Otto, 530.

The cross-complaint does not show what questions were litigated before the Department, and there is no averment as to the rulings on any particular point. It appears that there was a contest between the parties, and that the case was decided in favor of the plaintiff, but the grounds of the decision are not stated.

In this condition of the pleading, it is impossible to say that any error was committed in the construction of the law. If such an error is relied on, it should have been specifically pointed out. The case ought not to be opened on a mere surmise or conjecture. It may be that the law was properly construed, and that the decision turned simply upon the weight of evidence. If not, it was easy to state the fact, and thus enable the Court to act intelligently on the subject.

What the proofs were on the part of the plaintiff does not appear. It was competent for him to show that the settlement of the defendant was made in bad faith, or that he had acquired other lands and thereby exhausted his right of preemption. These and various other matters sufficient to defeat the claim of the defendant may have been established to the satisfaction of the Department, and the presumptions are in favor of the decision. We allude, of course, only to matters in regard to which the cross-complaint is silent. So far as the facts are stated, full force must be giveu to them, but in attacking the decision as involving an erroneous construction of the

law, it was incumbent on the defendant to show by proper averments that such an error was committed. Even the question we have considered as to the filing of the declaratory statement may not have been passed upon by the Department. The solution of this question depends upon the construction of the law, but there is nothing from which it appears that the Department was required to solve it or did so in point of fact. If the case, consistently with the allegations of the cross-complaint. might have been decided on other grounds, the Court cannot assume that this particular ground was the basis of the decision in any degree; and so as to all other questions of the same nature. If there is any ground of relief so presented as to bring it within the cognizance of the Court, it is that of fraud, and we do not desire to say anything further on that point.

We think the judgment of the Court below should be affirmed.

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